

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 20, 2008

LORENZO MALONE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Wilson County
No. 01-1404 John W. Wootten, Judge

No. M2007-02641-CCA-R3-PC - Filed March 11, 2009

The Petitioner, Lorenzo Malone, appeals the Wilson County Circuit Court's denial of his petition for post-conviction relief. In 2003, the Petitioner was convicted by a jury of first degree felony murder and, thereafter, sentenced to life imprisonment. On appeal, the Petitioner argues that he was denied the effective assistance of counsel at trial and on appeal, challenging counsel's handling of whether there was probable cause to support his arrest and obtain a search warrant. Following our review, we conclude that the Petitioner has not shown that he is entitled to relief. We affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Patrick G. Frogge, Nashville, Tennessee, for the appellant, Lorenzo Malone.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; Tom P. Thompson, District Attorney General; and Linda Walls, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Following a jury trial, the Petitioner was convicted of first degree felony murder, and he received a sentence of life imprisonment. See State v. Lorenzo Malone, No. M2003-02770-CCA-R3-CD, 2005 WL 1521788, at *1 (Tenn. Crim. App., Nashville, June 27, 2005). On direct appeal, this Court summarized the facts established at trial as follows:

In the late spring of 2001, the [Petitioner] and one of his codefendants, Harvey Baker, were shot at while sneaking through backyards and “scoping out” homes on Castle Heights Drive in Wilson County. Approximately three months later, on the night of August 2, the [Petitioner] returned to 908 Castle Heights Drive, along with his codefendants Baker and Richard Porter. Porter illuminated the back of the home with a flashlight and Baker opened the rear sliding glass door to the basement while the [Petitioner] held a shotgun. Upon entering the home, Baker took the shotgun from the [Petitioner], and the three men climbed the stairs to the den.

Once inside the den, the [Petitioner] waited by a gun case while his codefendants went through the house to see if anybody was home. The codefendants found eighty-three year old Robbie Jones, the victim in this case, sleeping in her bedroom. The codefendants then used the butt of the shotgun to beat Ms. Jones to death in her room. The [Petitioner] listened to “her moan” while using a BB gun to break the glass gun case open and collect its contents. All three men then grabbed guns from the case and fled the way in which they came into the home. However, the codefendants subsequently reentered the home to collect a shell casing, which had fallen out of one of the guns, while the [Petitioner] stood in the driveway to keep a lookout for police.

On the morning of August 3, 2001, Lynn Wills found her mother, Ms. Jones, lying dead at the foot of her bed. Wills then dialed 911. Responding officers investigated the scene, interviewed neighbors, and turned over twenty-seven items to Hunter Greene at the Tennessee Bureau of Investigation for DNA testing.

Detective Scott Massey of the Lebanon Police Department received a call on August 5, 2001, from one of the neighbors who had been interviewed, Michelle Steverson. Steverson was the girlfriend of Baker and roommate of all three codefendants at 911-G Castle Heights drive. Detective Donnie Self was dispatched to conduct the interview of Steverson. The interview revealed the locations of all three codefendants.

Once the [Petitioner] was arrested, he gave a statement admitting his involvement in the crimes to Detectives Joe Jones and Chris Melvin. Executing a search warrant of his residence, the officers found a 1964 half dollar stolen from Ms. Jones’ home, the shotgun used to beat Ms. Jones in the [Petitioner’s] laundry room, and several of the stolen guns in the woods behind the residence.¹ In addition, the officers received consent from the [Petitioner’s] sister, Marlana Leftrich, to search her residence. Inside this residence, the officers found a bag that the [Petitioner] had hid which contained a Colt gun box and the BB gun used to break open Ms. Jones’

¹ One of the stolen guns was not recovered, as the [Petitioner] admitted to selling it for \$80.00.

gun case. The officers were also granted consent to search the [Petitioner's] mother's home, where they found three additional stolen handguns.

Id. (footnote in original).

On direct appeal of these convictions to this Court, the Petitioner contended that the trial court erred by: (1) refusing to strike a potential juror for cause; (2) admitting photographs of the victim and a videotape into evidence; and (3) failing to grant a mistrial based upon impropriety in the State's closing argument. Id. After reviewing the record and applicable authorities, this Court affirmed the conviction. Id. at *1, 6. No application for permission to appeal was filed.

On June 26, 2006, the Petitioner, with the assistance of counsel, filed a petition for post-conviction relief alleging that he did not receive the effective assistance of counsel at trial or on direct appeal (the same lawyer represented the Petitioner at trial and on direct appeal and hereinafter will be referred to as "counsel"). As specific grounds for relief, the Petitioner averred that counsel was constitutionally ineffective at trial for failing to: (1) offer proof at the suppression hearing that the Petitioner's statement was involuntary; (2) challenge the probable cause supporting the search warrant; (3) contemporaneously object to the prosecutor's "inflammatory remarks"; (4) call co-defendant, Harvey Baker, to testify at trial; and (5) offer proof or argue that the burglary and homicide were unrelated. The Petitioner argued that the cumulative effect of counsel's errors denied him the effective assistance of counsel at trial. Regarding his direct appeal, the Petitioner submitted that counsel was ineffective for failing to: (1) appeal the motion to suppress the Petitioner's confession based upon lack of probable cause to arrest; and (2) include the videotape on appeal. He further contended that the trial court failed to properly instruct the jury on the applicable law, that counsel was ineffective for failing to request a jury instruction on "the natural and probable consequences rule[,] and that this issue should have been included on appeal.

A hearing was held in the post-conviction court at which Detectives Scott Massey and Donnie Self and counsel testified. After hearing the evidence presented, the post-conviction court denied relief. This appeal followed.

ANALYSIS

On appeal, the Petitioner argues that counsel failed to provide the effective assistance of counsel guaranteed him by the United States and Tennessee constitutions at trial and on direct appeal. First, he contends that counsel should have moved to suppress the evidence obtained pursuant to the search warrant because the warrant failed for lack of probable cause. Second, the Petitioner submits that counsel was ineffective for failing to present as an issue on direct appeal the trial court's denial of the Petitioner's motion to suppress his statement on the grounds that his arrest was illegal and, thus, that his statement was fruit of the poisonous tree.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not

reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under

a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

The Petitioner acknowledges that trial counsel did file a motion to suppress his confession. In the motion to suppress, the Petitioner argued that his arrest was not supported by probable cause or an arrest warrant:

The [Petitioner's] arrest was based upon information provided by Yvonne'de Michelle "Shell" Steverson and Dorrell Clemmons. [The Petitioner] submits that both of these individuals qualify as "informants" whose basis of knowledge and credibility was not properly established under State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989). As such, a probable cause finding can not properly be based upon information provided by these individuals.

The trial court held a hearing on the motion to suppress the Petitioner's statement. After hearing the evidence presented, the trial court denied the motion concluding that officers had probable cause to arrest the Petitioner and, thus, that his statement was admissible:

Well, I've listened carefully to the proof in this case about the issue of probable cause, and I wanted to make sure in my own mind, that's why I asked my own question of Detective Massey with regard to what he knew independently before even Ms. Steverson related to him the events that she either observed or found out from the three co-defendants, and so when you couple what she told them with what he already knew, and you combine those with the fact that no one but a few people could have known the cause of death because those things were not released to the media—the media had the wrong cause of death, the actual entry into the home, the weaponry that was found, and then you top that off with the admissions to Ms. Steverson by the three defendants of their involvement in the crime, you add all that up, and to me, that equals probable cause.

She's a named person in the search warrant, not necessarily—you can't even describe her as a confidential informant, but even if you want to go that route, there is still sufficient corroborating evidence that Detective Massey knew about when he made the decision to go and have [the Petitioner] picked up.

So I think all in all when you look at the proof I've heard and the totality of the circumstances here that he has related to me, that there was probable cause to pick up [the Petitioner] in this case

Counsel also referenced the search warrant at the suppression hearing, contending that Steverson was a suspect in the crime; otherwise, her consent to search would alone have been enough to search the premises. Specifically, trial counsel stated that "it gets down to whether she

was a citizen informant,” to which the trial judge responded, “She’s not even a confidential informant. She’s named in the body of the search warrant.” The trial court also noted,

Well, the problem with that is, if [the Petitioner] has a—lives there and has a privacy interest in certain aspects of that property, then maybe that consent would not be good as to him and we’d be here trying to suppress—or you would be here trying to suppress anything that was seized as it relates to [the Petitioner], so they’re taking another step, and that’s why—I guess that’s what they’re taking, another step.

The Petitioner, in this post-conviction proceeding, is now attempting to challenge the probable cause portion of the affidavit in support of the search warrant, again arguing that Michelle Steverson was an unreliable informant. The probable cause section of the warrant reads as follows:

On August 5, 2001 your affiant [Det. Scott Massey] received information from Detective Donnie Self who related that in an interview with Yvonne’de Michelle “Shell” Steverson she stated that she had conversations with [the Petitioner], Richard Porter, and Harvey Baker and in said conversations all three [men] admitted taking part in the burglary of the home that she knew belonged to [the victim] on Castle Heights Avenue and that Richard Porter did hit her with a shotgun during the burglary. Yvonne’de Michelle “Shell” Steverson also stated that she found handguns and long guns in her house that did not belong to her and some of the handguns had been sold by Harvey Baker. She has also related that the long guns were removed from the residence and hidden somewhere on her property as related to her by [the Petitioner]. All [three men] are living with Yvonne’de Michelle “Shell” Steverson at her residence

At the post-conviction hearing, Detective Massey testified that he and Lieutenant Osborne² were the only officers in the office on August 5 when Michelle Steverson telephoned. Lieutenant Osborne answered the telephone. Steverson relayed that she had information about the murder but that she would only talk to Detective Self. Detective Massey stated that he knew Steverson by name but that he was not personally familiar with her.

After interviewing Steverson, Detective Self stated that the three suspects were living with Steverson at her residence and that all three admitted to her their involvement in the crimes. Steverson further claimed that she had some of the stolen property at her home and on her property. According to Detective Massey, the information given by Steverson could have only been obtained by someone involved in the crime or someone who had spoken to a person involved in the crime, as certain details were not released to the public. Detective Massey confirmed his trial testimony that Steverson told Detective Self she was interested in reward money.

² It does not appear that this individual is further identifiable from the record before us.

Based upon the information provided by Steverson, Det. Massey conferred with the district attorney's office, and a decision was made to arrest the three men. Detective Massey also obtained a search warrant, which listed the three men and Michelle Steverson. When asked why Steverson was included, Det. Massey stated that she was not a suspect but that the house was leased in her name so she was listed on the search warrant. While Det. Massey believed he could rely on Steverson's consent to search, he obtained the search warrant "just to make sure we got our bases covered as far as access in the house since there were three single adults there living with her to make sure that we would be covered no matter what." Following their arrest, all three men gave confessions.

Detective Self testified that he surveyed the neighborhood the day after the murder and, at this time, he interviewed Steverson. Steverson was present at her residence with her daughter and the Petitioner. When questioned if she knew anything about the crime, Steverson responded that she did not.

According to Det. Self, the next day he was informed that Steverson needed to speak with him and, during a meeting between the two, she provided information about the crimes. Detective Self stated that he only knew Steverson from patrolling the area and "[n]ot anything professionally[.]" As far as he knew, Steverson had never been a criminal informant.

Counsel testified that she filed a suppression motion, arguing that the Petitioner was arrested without probable cause. When asked if she was able to determine if Steverson was a criminal informant or not, counsel responded that she attempted to cross-examine Det. Massey at the suppression hearing about his knowledge of Steverson. However, she was unsuccessful in determining whether Steverson was a criminal informant or citizen informant. Counsel also affirmed that she represented the Petitioner on direct appeal and that she did not appeal the informant issue.

On cross-examination, counsel testified that she filed numerous motions on behalf of the Petitioner and met with him on multiple occasions. When asked about Steverson, counsel opined that Steverson was a citizen informant. Counsel stated, "When I raised the issue in the Motion to Suppress, I had no real expectation of being successful, however, I wanted to utilize the opportunity to both see and hear the State's witnesses and possibly gain from those hearings something that I could use at trial for impeachment purposes." Counsel also hoped that the State would call Steverson as a witness at the hearing and that she would be able to cross-examine her.

When asked about the issues she choose to raise on appeal, counsel stated that she did some additional research on the suppression issue and that she was unable to find any case law in support of her position. She decided not to include the issue on appeal because she felt it "would probably detract from some of [the] other issues." Counsel noted that, even if Steverson was determined to be a criminal informant, the details provided by Steverson greatly enhanced her credibility because those details were not known to the public and were corroborated by independent police investigation.

The post-conviction court concluded that the Petitioner failed to prove his allegations of ineffectiveness regarding the suppression issues by clear and convincing evidence, ruling as follows:

You know, I don't believe that Jacumin goes that far. I believe it relates to confidential informants. In this search warrant, Ms. Steverson's name is out there. It is out there for everybody in the public to see that name. Indeed there's corroborating information from the police officers, all of those kinds of things that are in this record today, in the record contained in the transcript and the proceedings of this trial back in 2003, all of those things, and indeed, as it relates to that issue, the search warrant issue, the voluntariness issue, I don't think you have even come up to a preponderance of the level to say that your counsel was ineffective. Indeed I find to the contrary, there is clear and convincing evidence in this record that she was not only competent, but as effective as one could be given the facts and circumstances that you presented with.

If the information upon which probable cause is based is not of the officers' personal knowledge but is received from a criminal informant or a person from the "criminal milieu," probable cause under our state constitution is determined by the application of the Aguilar-Spinelli two-pronged test. State v. Williams, 193 S.W.3d 502, 507 (Tenn. 2006); State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989). That test requires the establishment of the basis of knowledge and the veracity of the informant supplying hearsay information. Jacumin, 778 S.W.2d at 432. The basis of knowledge prong requires that the affidavit contain facts from which the magistrate may determine that the informant had a basis for the claim regarding criminal conduct or contraband. Id.; see also State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). The veracity prong requires that the affidavit contain facts from which the magistrate may determine either the inherent credibility of the informant or the reliability of the information provided. Jacumin, 778 S.W.2d at 432; see also Moon, 841 S.W.2d at 338. However, independent police corroboration of the information provided by the informant may make up for deficiencies in either prong. State v. Powell, 53 S.W.3d 258, 263 (Tenn. Crim. App. 2000).

However, a different standard is applied to a "citizen informant." Information from a citizen informant is presumed reliable and not subjected to the same level of scrutiny as that of an anonymous informant. See State v. Melson, 638 S.W.2d 342, 354 (Tenn. 1982). Thus, information obtained from a citizen informant is not subject to the two-prong reliability test. Citizen informant information is presumed reliable because the informant has necessarily gained their information through first-hand experience, and their motivation for communicating with the authorities is based on the "interest of society or personal safety." State v. Luke, 995 S.W.2d 630, 636 (Tenn. Crim. App. 1998).

It appears from the information in the record that Steverson was a citizen informant. "We can find no indication that [Steverson] was from the criminal milieu or that she received any remuneration from the police for her assistance." State v. Oscar C. Wells, No. W2002-01486-CCA-R3-CD, 2003 WL 22204524, at *3 (Tenn. Crim. App., Jackson, Sept. 16,

2003); see also State v. Lewis, 36 S.W.3d 88, 98-99 (Tenn. Crim. App. 2000) While there was testimony that Steverson inquired about a reward, there was no suggestion that she ever received any compensation in exchange for her information. Thus, Steverson's information is presumed reliable. Lewis, 36 S.W.3d at 98-99. Accordingly, there need be no further showing regarding Steverson's veracity or basis of knowledge.

Nonetheless, even if Steverson were classified as a criminal informant, the affidavit is sufficient to satisfy the standard of Aguilar-Spinelli two-pronged test. The three men resided in Steverson's home, they confessed to her, and proceeds of the burglary were located in her home, demonstrating her basis of knowledge. Regarding the reliability of her information, Steverson relayed information about the crimes that could be known only by someone at the scene or conveyed from someone at the scene. Moreover, the details provided by Steverson were corroborated by independent evidence gathered by police. The information provided in the affidavit was sufficient to establish probable cause for the issuance of a search warrant. The Petitioner has not shown ineffective assistance of counsel.

The Petitioner also argues that counsel erred in failing to appeal the trial court's ruling on the motion to suppress his statement, contending that his confession resulted from an arrest without probable cause. However, the information provided by Steverson served as the basis for both the search warrant and the Petitioner's arrest, and we have already determined that this information established sufficient probable cause to support the search warrant. The same rationale applies to this issue.

Additionally, if an issue has no merit or is weak, counsel's performance will not be deficient for failure to raise it, and a petitioner will have suffered no prejudice. Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004). Appellate counsel is not constitutionally required to raise every conceivable issue on appeal, and the determination of which issues to raise is generally within counsel's sound discretion. Id. Counsel stated that she believed there was no merit to the claim and that its inclusion on appeal would have detracted from other issues. The Petitioner has failed to establish ineffective assistance in regard to this issue.

CONCLUSION

Based upon the foregoing reasoning and authorities, we conclude that the Petitioner has not shown he is entitled to relief on grounds of ineffective assistance of counsel. The judgment of Wilson County Circuit Court denying post-conviction relief is affirmed.

DAVID H. WELLES, JUDGE